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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 655

FLORENCE B. BIGELOW, ET AL.,
Petitioners,

vs.

LOEW'S INCORPORATED, A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS C. MCCONNELL,
Attorney for Petitioners.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Florence B. Bigelow, Marion B. Koerber, John E. Bloom and William C. Bloom, respectfully pray that a writ of certiorari may issue to the United States Court of Appeals for the Seventh Circuit to review its mandate and opinion reversing a non-appealable order of the United States District Court. That order refused to construe an injunction decree entered against Loew's Incorporated, a corporation; Paramount Pictures, Inc., a corporation; RKO Radio Pictures, Inc., a corporation; Twentieth Century Fox Film Corporation, a corporation; Warner Bros. Pictures Distributing Corporation, a corporation; Warner Bros. Circuit Management Corporation; Warner Bros. Theatres, Inc., a corporation,

defendants who had been found to be in an illegal motion picture monopoly, in such manner as to permit respondent to compel petitioners to submit to competitive bidding against the monopoly in order to obtain motion pictures for exhibition in petitioners' Jackson Park Theatre. In settling the terms of the decree more than four years before the District Court had rejected defendants' proffered decretal provision embodying such a provision; the Court of Appeals had affirmed such refusal, and a petition to review the injunction decree by certiorari had been refused by this Court.

JURISDICTION.

The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. A. § 1254(1).

The judgment of the Court of Appeals was entered on December 23, 1952.

OPINION BELOW.

The opinion of the Court of Appeals appears in the record at pages 266-271 but is not as yet reported. The District Court's opinion appears in the record at pages 201-204 and its findings of fact and conclusions of law appear at pages 239-241 of the record.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners brought this suit under Sections 1, 2 and 7 of the Sherman Act, 26 Stat. 209-210, and Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. §§ 1, 2 and 15, for an injunction and to recover treble damages for violation of the Federal anti-trust laws. The award of damages to petitioners was reversed by the Court of Appeals (150 F. 2d 877) and upon review by certiorari this Court reversed the Court of Appeals and affirmed the District Court's judgment in the amount of $360,000.00 and costs.

Petitioners' complaint was described by the previous opinion of this Court (327 U. S. 251, 256-7) as based on "the discriminatory operation of the system of releasing pictures for showing in allotted playing positions, whereby the petitioners were prevented from acquiring films for exhibition until they had been shown in respondent distributors' theatres competing with the Jackson Park * * *".

After remand of the case to the District Court and a further hearing there, the District Court on October 16, 1946 entered an injunction decree which among other things enjoined the defendants from "preventing the plaintiffs or any of them in the operation of the Jackson Park Theatre from contracting for or from securing in the course of interstate trade and commerce at fair and reasonable film rental any motion picture film or films suitable for first run exhibition on the south side of Chicago; * * *".

At the same hearing the defendants asked the Court to enter in lieu of the above injunctive provision the following:

> "From refusing to license motion picture films to the plaintiffs for their Jackson Park Theater upon competitive bidding for any run of such films which the distributor may offer to any theater on the South Side of Chicago, * * *."

The District Court refused to enter such a provision in the decree (R. 202).

On appeal, the Court of Appeals affirmed the injunctive provision first above set forth (162 F. 2d 520, 524). On that appeal the defendants requested in their brief that the Court of Appeals strike Section V(b) from the decree and enter in lieu thereof the following:

> "* * * that hereafter the plaintiff may bid against all competing exhibitors, including defendants, on equal terms and free of any discrimination, for any run of any film which a distributor is willing to license in the plaintiffs' competitive area."

This the Court of Appeals refused to do. This Court then denied certiorari (332 U. S. 817).

Almost five years later, on July 18, 1951 (R. 4-13) respondent filed a petition asking "That the Court enter an order herein interpreting and clarifying Section V(b) of the decree herein by declaring that Petitioner [respondent] has the right to receive, from Respondents [petitioners] and from any exhibitors operating theatres in substantial competition with the Jackson Park Theatre, bids for exclusive licenses to exhibit pictures on first neighborhood run, or any other run, in the competitive area in which the Jackson Park Theatre is located, and to award such a license to the exhibitor from whom Petitioner [respondent] receives the highest and best bid."

The District Court, after a full hearing, denied this petition, finding that it had already adjudicated the requested change against the contentions of respondent (R. 202, 239) and finding further that "no change in circumstances or any undue hardship resulting from the application of the decree" were shown by the evidence (R. 240) and said, among other things (R. 202):

> "That lawsuit was tried out; a verdict by jury was had; judgment was entered and afterwards a decree was entered. Before that decree was entered * * * the very issue being discussed at this time was then discussed, and the defendants in the original lawsuit—including the petitioner in this proceeding—requested the following provision entitled 4-a be substituted for section V(b) in a proposed decree that they offered.
>
> " 'From refusing to license motion picture films to the plaintiffs for their Jackson Park Theater upon competitive bidding for any run of such films which the distributor may offer to any theater on the South Side of Chicago, when the plaintiffs request that any such film or films be licensed to the bidder offering the best terms for such run, or to the bidders offering the best terms if such run be offered for simultaneous exhibition in two or more theaters in said area.'

"That is exactly what he is arguing for here and that is what he was arguing for then. Instead of putting that provision in the decree we adopted the provision that is now in the decree; that has been up to the Court of Appeals and an attempt was made to bring the proceedings to the United States Supreme Court. *That decree, in the shape it now is, with the exception of the paragraph the Court of Appeals eliminated, has been approved.* It has been in existence and it has been operating all this time since the decree was entered." (Italics ours.)

The District Court further said (R. 203):

"* * * I have read this Supreme Court decision in the *Paramount* case, 334 U. S. 526, * * *. In no uncertain terms do the members of that court indicate that a compulsory competitive bidding system in connection with this industry is not a fair system so far as the little fellow in this industry is concerned.

"It is not difficult to see what would happen if this decree were changed. We have a zone here that takes in two or three theatres—maybe four; they are of a size alike. There is nothing in the law, or this decree, which would prevent the distributors from changing that zone tomorrow and compelling competition with different theaters than those mentioned in the present zone. The result would be, as pointed out in the Supreme Court decision, that those with the greatest amount of money, the greatest amount of force and the greatest amount of power could very easily and quickly just do away with the existence of any small or independent exhibitor."

On appeal, the Court of Appeals reversed the District Court, holding in effect that in order to obtain any pictures petitioners must outbid theatres owned by defendant who in this case (162 F. 2d 520) were found to be in a conspiracy to destroy petitioners' business and which conspiracy Mr. Justice Minton, then sitting as a Court of Appeals Judge, had described as follows:

"The defendants were found guilty of one conspiracy

in restraint of trade in violation of the Sherman Act, 15 U. S. C. A. Secs. 1, 2. The jury so found, and the District Court, this Court, and the Supreme Court upheld the finding of conspiracy. The conspiracy so operated that the defendants might hold a picture in the Loop for the benefit of their theaters there, at minimum admission prices to be charged, for such playing time as the defendants might agree upon. When the picture was through playing in the Loop, there was a clearance time of three weeks before it could play elsewhere in Chicago. The picture was then channeled in a series of release weeks through theaters owned and operated by the defendants, and finally in the tenth week after the Loop run, the plaintiffs were permitted to buy the picture in the first week of general release.

"In other words, whatever income that picture was capable of producing was squeezed out of it for the benefit of the defendants, who operated under the unlawful conspiracy, before the defendants permitted the plaintiffs to buy * * *. No theater could operate successfully in the Chicago district without the pictures which the defendants controlled."

In its present opinion, holding that petitioners must outbid respondent's monopoly in order to obtain pictures for the Jackson Park Theatre, the Court of Appeals under the guise of construction has changed a decree without any showing of any unforeseeable change in conditions existing at the time the decree was entered as required by this Court in its opinion in the case of *United States* v. *Swift & Company,* 286 U. S. 106; has assumed jurisdiction to rehear an issue decided against respondent's contention some five years before, and under the guise of construction has written into a decree a provision for competitive bidding without any of the safeguards provided for in the provision for competitive bidding in the Government decree which this Court struck from such decree in *United States* v. *Paramount Pictures, Inc., et al.,* 334 U. S. 131.

The public interest involved in the decision of this question is manifest and apparent because, as stated by the District Court (R. 203) those who have been found guilty of conspiring to destroy their independent competitors can now with Court sanction "very easily and quickly just do away with the existence of any small or independent exhibitor".

Further, the readjudication under the guise of construction of an issue decided many years ago is an unwarranted exercise of jurisdiction by a Court of Appeals not sanctioned by any statute creating appellate jurisdiction in the United States Court of Appeals, thus presenting a question of large importance not only in the administration of the anti-trust laws but in the administration of justice in the Federal Courts.

QUESTIONS PRESENTED.

(1) Where an injunction decree requires films to be offered at "fair and reasonable film rental" to a petitioner who has been damaged by an illegal exhibition monopoly, does a Court of Appeals have jurisdiction to read into that provision a further requirement compelling petitioner to outbid the monopoly in order to obtain films?

(2) Does a Court of Appeals have jurisdiction under the guise of construction to modify an injunction decree without any showing of hardship or a change in conditions not foreseeable at the time the decree was entered?

(3) Can a system of competitive bidding, which was unequivocally condemned by this Court in the case of *United States* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131, be inserted in an injunction entered pursuant to the anti-trust laws as the method by which "fair and reasonable film rental" to be charged by a monopoly for its films must be determined?

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. The Court of Appeals has assumed jurisdiction to modify a decree under the guise of construction without any showing of a change in conditions not foreseeable at the time the decree was entered. This assumption of jurisdiction is in direct conflict with the decision of this Court in the case of *United States* v. *Swift & Company*, 286 U. S. 106.

2. The Court of Appeals has without any appellate jurisdiction read into a decree of injunction requiring an illegal exhibition monopoly to offer pictures at "fair and reasonable film rental", from which the time to appeal had long since expired, a provision for competitive bidding in direct conflict with the decision of this Court in the case of *United States* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131.

3. The Court of Appeals has assumed jurisdiction to review an order not appealable under Federal statutes in that it was not an interlocutory order as defined in 62 Stat. 929; 28 U. S. C. A., § 1292, nor was it a final order within the provisions of 62 Stat. 929; 28 U. S. C. A., § 1291.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

FLORENCE B. BIGELOW,
MARION B. KOERBER,
JOHN E. BLOOM and
WILLIAM C. BLOOM,

Petitioners,

By THOMAS C. MCCONNELL,
Their Attorney.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for a writ of certiorari.

JURISDICTION.

The jurisdiction of this Court is shown in the accompanying petition.

OPINION BELOW.

The opinion of the Court of Appeals appears at pages 266-271 of the record and is as yet unreported.

SPECIFICATION OF ERRORS.

If a writ of certiorari is issued, petitioners intend to urge that the Court of Appeals for the Seventh Circuit erred:

(1) In setting aside the District Court's decision that the original decree in this cause meant what it said; namely, that petitioners were to be offered pictures at "fair and reasonable film rental," and in further declaring that respondent could comply with the decree by offering the pictures to petitioners under a system of competitive bidding not mentioned in the decree.

(2) In entertaining jurisdiction to reverse an order of the District Court which was not appealable under any Federal statute.

ARGUMENT.

I.

THE COURT OF APPEALS HAS EXCEEDED ITS APPELLAT JURISDICTION BY REWRITING AN INJUNCTION DECRE BY JUDICIAL INTERPOLATION, WHICH DECREE HAD BE COME FINAL AND NOT SUBJECT TO REVIEW.

The injunction decree provided in Section V(b) (Re 267) that the defendants are enjoined from "preventin the plaintiffs or any of them in the operation of the Jack son Park Theatre from contracting for or from securin in the course of interstate trade and commerce at fair an reasonable film rental any motion picture film or film suitable for first run exhibition on the south side c Chicago; * * *".

This decree became final on November 19, 1947, whe after affirmance in the Court of Appeals and pursuant t a mandate of that Court, it was re-entered in the Distric Court on that date. If for any reason it did not compl with the Court of Appeals mandate a Notice of Appea had to be filed within thirty days from November 19, 194 This is expressly provided for in Rule 73(a) of the Fec eral Rules of Civil Procedure. Without the serving of notice of appeal within the time designated in the ru the Court of Appeals had no jurisdiction to review the in junction. See *Dickinson* v. *Petroleum Conversion Corp.* 338 U. S. 507, 520.

The petition in the instant case was filed on July 1, 1951 (R. 4) and sought an order "interpreting and clarify ing Section V(b) of the decree herein by declaring that Petitioner [respondent] has the right to receive, from Re spondents [petitioners] and from any exhibitors operating

theatres in substantial competition with the Jackson Park Theatre, bids for exclusive licenses to exhibit pictures on first neighborhood run, or any other run, in the competitive area in which the Jackson Park Theatre is located, and to award such a license to the exhibitor from whom Petitioner [respondent] receives the highest and best bid."

Respondent thus sought to modify the decree by providing that petitioners in order to obtain any pictures had to outbid all other theatres including the theatres of defendants who had been found guilty by this Court (*Bigelow et al.* v. *RKO et al.*, 327 U. S. 251) of conspiracy to exclude petitioners from the exhibition business.

The trial court, after an extensive hearing on the petition, said (R. 203-4):

> "I do not think the picture has changed a bit. I think the situation today is just what it was at the time the decree was entered. I do not think the facts introduced here in any way change the decree."

The District Court found (R. 260):

> "That the petitioner [respondent] has shown no change in circumstances or any undue hardship resulting from the application of the decree which would justify any modification or change in Section V(b) of the present decree."

As was stated by this Court in the *Swift* case, 286 U. S. 106, 119:

> "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. * * * Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

The District Court found that there was nothing in the decree providing for competitive bidding (R. 240). The

Court of Appeals points to no language in the decree providing for competitive bidding and of course there is none there (R. 8-13).

That interpolating competitive bidding into the provision of the instant decree constitutes a substantial modification thereof is conclusively shown by the decision of this Court in the case of *United States* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131, 162-3. There, this Court had the following to say about competitive bidding:

> "It is largely out of the ruins of the small operators that the large empires of exhibitors have been built. Thus it would appear to be a great boon to them to substitute open bidding for the private deals and favors on which the large operators have thrived. But after reflection we have concluded that competitive bidding involves the judiciary so deeply in the daily operation of this nationwide business and promises such dubious benefits that it should not be undertaken.
>
> "'* * * Columbia puts these pertinent queries: 'No two exhibitors are likely to make the same bid as to dates, clearance, method of fixing rental, etc. May bids containing such diverse factors be readily compared? May a flat rental bid be compared with a percentage bid? May the value of any percentage bid be determined unless the admission price is fixed by the license?'
>
> "The question as to who is the highest bidder involves the use of standards incapable of precise definition because the bids being compared contain different ingredients. Determining who is the most responsible bidder likewise cannot be reduced to a formula. The distributor's judgment of the character and integrity of a particular exhibitor might result in acceptance of a lower bid than others offered. Yet to prove that favoritism was shown would be well nigh impossible, unless perhaps all the exhibitors in the country were given classifications of responsibility. If, indeed, the choice between bidders is not to be entrusted to the uncontrolled discretion of the distribu-

> tors, some effort to standardize the factors involved in determining 'a reasonable return to the licensor' would seem necessary."

In the instant case, the Court of Appeals has read into the decree a system of competitive bidding not even defined, and has entrusted the administration of the system to the uncontrolled discretion of co-conspirators already found guilty by this Court of conspiring to put these very petitioners out of business. A precedent is thus created whereby those found guilty under the anti-trust laws are to be vested with the discretion to reject any offer for pictures made by petitioners if any co-conspirator chooses to match such bid. All the evils of the original conspiracy are thus preserved, with the blessing and sanction of a Federal court. This has been done without any finding of any change in the conditions existing at the time the original decree was entered and without anything in the record from which such a finding could be made. Under this Court's decision in *United States* v. *Swift & Company,* 286 U. S. 106, 119 the Court of Appeals had no power or jurisdiction to so act.

II.

THE COURT OF APPEALS HAD NO JURISDICTION TO CONSTRUE THE DECREE BY INTERPOLATING THEREIN A PROVISION FOR COMPETITIVE BIDDING.

The District Court held:

> "Instead of putting that provision in the decree we adopted the provision that is now in the decree; that has been up to the Court of Appeals and an attempt was made to bring the proceedings to the United States Supreme Court. That decree, in the shape it now is, with the exception of the paragraph the Court of Appeals eliminated, has been approved. It has been in existence and it has been operating all this time since the decree was entered."

It thus conclusively appears that the denial of respondent's petition was in effect a denial of a rehearing on an issue already adversely determined to respondent's contentions. Such an order is not appealable under Federal statutes.

See:

Conboy v. *First National Bank,* 203 U. S. 141.
Bank of Lewisburg v. *Sheffey,* 140 U. S. 445.

Further the District Court itself had no jurisdiction to rehear contentions made prior to the entry of the injunction decree unless presented within the time an appeal could be taken from the injunction decree. See *Safeway Stores Inc.* v. *Coe,* 136 F. 2d 771; *Jusino* v. *Morales & Tio,* 139 F. 2d 946; *Nealon* v. *Hill,* 149 F. 2d 883; *Norris* v. *Camp,* 144 F. 2d 1; *Gersing* v. *Chafitz,* 133 F. 2d 384.

The assumption of jurisdiction by the Court of Appeals in effect to rehear and reverse an order of the United States District Court which was first entered five years before the instant appeal is not permitted by any Federal statute.

See:

American Construction C. v. *Jacksonville, T. & K. W. R. Co.,* 148 U. S. 372.
Dickinson v. *Petroleum Conversion Corp.,* 338 U. S. 507.

Further, the Court of Appeals for the Seventh Circuit had no jurisdiction to advise respondent as to whether or not conduct contemplated in the future would or would not subject it to contempt proceedings. The Court of Appeals has stated this position itself in the case of *J. Greenebaum Tanning Co.* v. *National Labor Relations Board,* 129 F. 2d 487, 488, where the Court said:

"We know of no law which confers upon us the

> authority, under the guise of modification or interpretation, to advise an employer as to whether or not his activities constitute a violation of a decree."

Nevertheless the Court has created for itself this jurisdiction in complete contravention of the Federal statutes having to do with appeals. A question of great importance in the administration of justice in the Federal courts is thus presented.

CONCLUSION.

The decision of the Court of Appeals in effect attempts to modify an injunction decree which had long since become unappealable without any showing of a change in conditions as required by this Court's decision in *United States* v. *Swift & Company,* 286 U. S. 106. No other basis for jurisdiction by a Court of Appeals exists because the original decree had long since become final and not subject to further appellate court review.

For the reasons given here, we submit that questions of large public importance in the administration of the antitrust laws and concerning the jurisdiction of a Court of Appeals to modify and change a final decree are presented, and that therefore this Court's writ of certiorari should issue to the Court of Appeals for the Seventh Circuit to review its decision in the instant case.

Respectfully submitted,

THOMAS C. MCCONNELL,
Attorney for Petitioners.

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OPINION BELOW.

The opinion of the Court of Appeals is reported at 201 F. 2d 25, advance sheets March 2, 1953.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioners under 62 Stat. 928, 28 U. S. C. § 1254(1). The judgment of the Court of Appeals was entered on December 23, 1952 (R. 272).

STATEMENT OF FACTS.

The grounds asserted by petitioners for granting a writ of certiorari rest upon distortion and concealment of the record. The petition and supporting brief claim that the judgment sought to be reviewed was a modification by construction of the original decree in this case, and that such decree had been affirmed on an earlier appeal. The fact is that the decree was modified on the earlier appeal and the judgment sought to be reviewed now merely corrected an attempt by the trial court, after the first appeal, to disregard the Court of Appeals' modification of the decree.

On October 16, 1946, the District Court entered a decree which provided, among other things, that the defendant motion picture distributors, including respondent, should license their films to play at the petitioners' theatre on a specified "run" (R. 8, 10, 168). That would have given the petitioners a vested right to the specified playing position, regardless of the desire of any other exhibitor to compete with them for priority of run. The District Court rejected an alternative decree tendered by the defendants which would have given the petitioners only the right to compete against other exhibitors in the same area for priority of run (R. 202).

The Court of Appeals on the first appeal modified the decree by striking from it the provision which required the defendant distributors to serve the petitioners' theatre on a designated run (R. 10, 168). The Court of Appeals did not incorporate in the decree itself the defendants' proposed alternative provision for competitive licensing, but it said in its opinion:

> "The plaintiffs have a right to compete for any playing position, but they have no right to be awarded and protected by decree in any certain position." *Bigelow* v. *RKO Radio Pictures*, 162 F. 2d 520, 524.

Soon after the modified decree first became operative the petitioners brought a contempt proceeding against respondent and other defendants, claiming that they had violated the decree by adopting plans of film distribution in Chicago whereby competing exhibitors in the same area could bid against each other for priority of run.

The District Court acquitted the defendant distributors, including the respondent, of that charge, and said in its opinion, after citing the above quoted language of the Court of Appeals:

> "There is nothing in the decree which prohibits individual distributors from creating zones for competitive bidding. * * * If the distributors provide the [petitioners'] Jackson Park Theatre an opportunity to bid for the exhibition of motion pictures in the established competitive areas and if these zones are devised reasonably and in good faith, this court will not interfere with their commercial practices." (R. 176.*)

The respondent thereafter continued to license its pictures in Chicago by the competitive method, wherever two or more exhibitors desired to compete for priority of run. The petitioners were not required to compete at that time, however, because no other exhibitor considered by the respondent to be in their competitive area then wanted to bid against them. (R. 45-48, 66.)

In 1950 the operators of a new theatre, who were competitors of the petitioners, demanded the same playing position as the petitioners had, with the result that the respondent instituted competitive bidding between them (R. 48-53). For more than a year thereafter the petitioners, without ob-

* The proceedings in the 1948 contempt hearing are referred to at the record page cited, and were not disputed below. The parties had agreed, with the approval of the lower court, that they might refer to and use portions of prior records on appeal without incorporating them physically in the record below (R. 257).

jection, engaged in competitive bidding against those competitors (R. 5, 17). In 1951 another of the petitioners' competitors demanded the right to join in the bidding (R. 58, 59, 92, 93). When respondent undertook to honor that demand, the petitioners claimed that under the decree they could not be required to compete against anyone and they threatened to cite respondent for contempt unless it would negotiate with them non-competitively and would license them on the run they wanted, regardless of their competitors' bids (R. 6, 17).

The respondent thereupon filed a petition in the District Court for a construction of the decree. The relief asked was in the nature of a declaratory judgment that under the decree as modified it had the right to receive competitive bids for its pictures from the petitioners and from competing exhibitors and to award each picture to the highest bidder (R. 7, 8). However, the District Court held on this occasion that the decree meant that the petitioners could not be required to bid against anyone for priority of run (R. 240, 241). It thereby reversed the position it had taken in the prior contempt proceeding.

It was in that posture that the Court of Appeals took the case for the second time, reversed the District Court's order and confirmed by its opinion that by its prior opinion and modification of the decree on the first appeal it had intended to make it perfectly clear that the petitioners were not entitled to any immunity from competition.

Completely distorting the above facts, the petitioners would have this Court believe that the Court of Appeals on the first appeal affirmed the decree without modification and concurred with the District Court's view that the petitioners should be protected by the decree from the competition of other exhibitors.

The petitioners would keep this Court in ignorance of

the subsequent judgment of the District Court in the contempt proceeding, whereby that court held that film licensing by means of competitive bidding does not violate the decree as modified on the first appeal.

By thus misstating the judgment of the Court of Appeals on the first appeal and concealing the judgment of the District Court in the contempt proceeding, the petitioners would have the Court believe that the District Court had no jurisdiction over the respondent's subsequent petition to construe the decree, because the respondent merely was seeking a "rehearing" of an issue theretofore finally adjudicated against it. From this it is claimed to follow that the judgment entered by the District Court on the respondent's petition, whereby the decree was construed to mean that the petitioners did not have to compete against anyone, was not a final or appealable order.

Finally, the petitioners would have the Court believe that when, on respondent's appeal from that ruling, the Court of Appeals reversed the District Court, holding that the petitioners are entitled only to compete for a playing position, it "modified" the original decree although it had lost appellate jurisdiction thereof and no change of conditions warranting a modification had been shown.

On the true facts, there is no substance to any of the petitioners' asserted reasons for granting a writ of certiorari.

ARGUMENT.

In the decision sought to be reviewed, the Court of Appeals did not modify the decree, either actually or by construction, as the petitioners contend. It already had modified the decree on the first appeal and it entertained the second appeal because the District Court thereafter had placed a construction on the decree which was wholly inconsistent with such modification.

The Court of Appeals did not read into the decree any provision for competitive bidding. It merely held that the decree, as previously modified, does not prohibit competitive bidding nor entitle the petitioners to any fixed and favored playing position.

The petition which the respondent filed in the District Court for a construction of the decree was not an effort on respondent's part to obtain a rehearing of issues theretofore decided against it. Instead, it was a proper application to obtain an order of construction in the nature of a declaratory judgment, based squarely upon the previous holding of the Court of Appeals and the last previous ruling of the District Court and made necessary by the threats of the petitioners.

The respondent was not obliged to wait until the petitioners cited it for contempt in order to obtain a binding construction of the decree. Indeed, had it done so, it would have been subject to criticism. *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187 (1949) at 192. *Regal Knitwear Co.* v. *Labor Board*, 324 U. S. 9 (1945) at 15. *Minnesota Co.* v. *St. Paul Co.*, 69 U. S. (2 Wall.) 609 (1864) at 632-634.

The order of the District Court construing the decree was final and appealable. When, after a decree which dis-

poses of a principal subject of litigation, there arise important matters making necessary orders and decrees in which the material rights of the parties are affected, a final adjudication with respect to such rights is appealable. *Blossom* v. *Railroad Company*, 68 U. S. (1 Wall.) 655 (1863) at 657. *Farmers' Loan and Trust Co.*, 129 U. S. 206 (1889) at 213. *Utah Const. Co.* v. *Salmon River Canal Co.*, 85 F. 2d 769 (C. A. 9th Cir. 1936) at 771; cert. den. 300 U. S. 663.

The petition injects into the asserted reasons for granting a writ of certiorari a suggestion that the Court of Appeals, in concluding that the decree in this case does not prohibit competitive bidding, created a conflict with the decision of this Court in *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948) at 162-165. The suggestion clearly is without merit. There is no disharmony between the two cases.

In the *Paramount* case this Court held that a decree in a suit by the United States should not include a provision for mandatory competitive bidding on a nation-wide scale, since the Court believed that under some circumstances competitive bidding could be abused so as to produce results not intended by the trial court in that case. This Court, however, said nothing in the *Paramount* case to indicate that competitive bidding in film licensing is illegal *per se* or even that it may not be, in a particular case, the best way to resolve a competitive conflict among rival exhibitors.

The Court of Appeals in this case, on the other hand, did not hold that competitive bidding is required by this decree and did not give blanket approval to competitive bidding under any and all conditions, but held only that this decree does not prohibit competitive bidding (R. 270; 201 F. 2d at p. 28).

For the foregoing reasons, no valid ground for granting a writ of certiorari has been advanced.

There is an additional reason why the Court should not take this case. The modification of the decree by which the petitioners lost their claimed right to immunity from competition was accomplished on the first appeal, in 1947. The petitioners did not then seek to have this Court review that decision and it no longer is subject to review. By the decision now sought to be reviewed the Court of Appeals simply reaffirmed its former decision and set aside a conflicting construction of the decree by the District Court. The second decision of the Court of Appeals could not be reversed to any effect without setting aside its first decision also, and to bring that decision up for review at this late date is beyond the power of the petitioners.

The petitioners evidently realize that the modification of the decree on the first appeal leaves them without a leg to stand on now. The petition is a bold attempt to ignore the result of the first appeal and thereby to deceive the Court into granting a writ of certiorari on asserted grounds which, without such deception, patently are devoid of merit.

CONCLUSION.

The respondent respectfully prays that the petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that court entered December 23, 1952, be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 655

FLORENCE B. BIGELOW, ET AL.,
Petitioners,

vs.

LOEW'S INCORPORATED, A CORPORATION,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

THOMAS C. MCCONNELL,
Attorney for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondent can make no answer to the petition for certiorari except to say, contrary to the record, that the Court of Appeals had modified the injunction decree on the first appeal in such manner as to justify so-called competitive bidding.

As we pointed out in the petition, on the first appeal the defendants attacked Section V(b) of the decree and asked that a provision for competitive bidding be substituted in lieu thereof (R. 202).

Section V(b) of the decree provided that the defendants are enjoined from "preventing the plaintiffs or any of them in the operation of the Jackson Park Theatre from contracting for or from securing in the course of interstate trade and commerce at fair and reasonable film rental any motion picture film or films suitable for first run exhibition on the south side of Chicago; * * *."

Mr. Justice Minton, who wrote the opinion on the first appeal, refused to modify Section V(b) in any particular, saying, 162 F. 2d 520, 523:

> "This defendant (Balaban & Katz Corporation) made no motion to modify the decree in the respects to which it now objects. Consequently, the District Court had no chance to rule on the contentions urged here for the first time. However, we have considered these contentions, and we find no merit in them except as hereinafter mentioned. * * * The provisions of the decree complained of were reasonably adapted to breaking up the conspiracy, a part of which was the method of release, and such provisions were therefore properly entered."

The Court then found no merit in the defendants' contentions with reference to Section V(b). The Court did, however, strike out Section V(e), which has no application here and which is not involved in the issue now presented. The Court, after deleting Section V(e), said:

> "With this modification, we find no basis for objection to the decree, and, as modified, the decree is affirmed."

That the Court did not intend any change and did not make any change in Section V(b), which is the only section here in controversy, is shown by the Court's statement as follows:

> "The decree which the court has entered, we think, rather effectively destroys the conspiracy and therefore leaves the future open to the plaintiffs to compete for the pictures *at a reasonable price.*" (Italics ours.)

It is, therefore, crystal clear that Section V(b) of the decree was not, as respondent now asserts, modified by the Court of Appeals on the first appeal. The present modification comes five years after Section V(b) was re-entered by the District Court on remand on the first appeal (R. 202).

The reason that respondent labors so strenuously to distort the prior opinion of the Court of Appeals is that respondent realizes that the present change is a modification unsupported by any change in condition as required by this Court in *United States* v. *Swift & Company*, 286 U. S. 106, 119.

In the instant case the lower court held as follows (R. 203-4):

> "I do not think the picture has changed a bit. I think the situation today is just what it was at the time the decree was entered. I do not think the facts introduced here in any way change the decree."

Further, the trial court found (R. 260):

> "That the petitioner has shown no change in circumstances or any undue hardship resulting from the application of the decree which would justify any modification or change in Section V(b) of the present decree."

The Court of Appeals found no change in circumstances or condition which would under any conceivable construction of the *Swift* case vest jurisdiction in the Court of Appeals to modify the decree.

Reiterating what we said in the petition for writ of certiorari, the Court of Appeals on the first appeal affirmed Section V(b) of the decree without modification. The present opinion of that Court in modifying such decree by writing into it provisions for competitive bidding five years after the decree had become final and non-appealable without any showing of any change in condition is we submit beyond the jurisdiction of the Court of Appeals, and a question of large importance in the administration of Federal law is thus raised by the petition.

Conclusion.

For the reasons given in the petition for certiorari, it is respectfully urged that the writ issue to review the judgment of the Court of Appeals for the Seventh Circuit, entered December 23, 1952.

Respectfully submitted,

THOMAS C. MCCONNELL,
Attorney for Petitioners.